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COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

JOSHUA GOLLIDAY, APPELLANT	§	FILED COURT OF CRIMINAL APPEALS 9/27/2017 DEANA WILLIAMSON, CLERK
V.	§	NO. PD-0812-17
THE STATE OF TEXAS, APPELLEE	§	

PETITION FOR DISCRETIONARY REVIEW FROM THE COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS' EN BANC PUBLISHED OPINION IN CASE NUMBER 02-15-00416-CR, IN THE APPEAL FROM CAUSE NUMBER 1379815D, IN THE 371ST JUDICIAL DISTRICT COURT OF TARRANT COUNTY, TEXAS; THE HONORABLE(S) VICKI ISAAKS & MOLLEE WESTFALL, PRESIDING.

STATE'S PETITION FOR DISCRETIONARY REVIEW

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3. Did the majority opinion contradict this Court's precedent by holding, in the alternative, that Appellant preserved his constitutional complaints about the exclusion of defense evidence with, among other things, a general remark, made during opening statement, and his argument that the victim's testimony from the first voir dire hearing was relevant so the jury could "get the whole picture"? RR. III-95, 153.

4. Did the majority opinion properly deal with Appellant's en masse first offer by plucking out items when the offer contained other material that was inadmissible? RR. III-86-96, 135-42.

5. Did the majority opinion correctly find constitutional violations in the exclusion of defense evidence? RR. III-86-96, 133-42.

IDENTITY OF JUDGE(S), PARTIES AND COUNSEL

- The parties to the trial court's judgment are the State of Texas and Appellant, Mr. Joshua Golliday.

- The trial judge(s) were the Honorable Vicki Isaaks (visiting judge, presiding at trial) and Mollee Westfall (elected judge of the 371st Judicial District Court).

- Counsel for the State at trial were Tarrant County Criminal Assistant District Attorneys Lucas Allen and Anna Hernandez, 401 W. Belknap Street, Fort Worth, Texas 76196-0201.

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STATEMENT REGARDING ORAL ARGUMENT

The State does not request oral argument. While the en banc published majority opinion refused to comply with, address, or even acknowledge, this Court's contrary precedent in *Anderson v. State*, 301 S.W.3d 276, 280 (Tex.Crim.App. 2009) and *Reyna v. State*, 168 S.W.3d 173, 179 (Tex.Crim.App. 2005), oral argument on a court's failure to comply with clear precedent is unnecessary.

STATEMENT OF THE CASE

Appellant was convicted of sexual assault. Appellant and the sexual-assault victim, though neighbors, barely knew each other prior to the night of the offense. SX-30 at 0:48 ("I don't know anything about [Appellant] . . . ."); RR. III-37 (victim didn't know her neighbors). The victim's distraught 9-1-1 call, made while the victim was chasing Appellant, described Appellant's crime in detail. *E.g.*, SX-30 at 7:44 ("[Appellant] ran as soon as I called the cops and I chased him . . . ."). In

her 9-1-1 call, the victim reported Appellant's license plate number as she pursued him. *Id.* at 1:20.

A majority of the en banc court of appeals reversed Appellant's conviction based upon the trial court's exclusion of defense evidence.

STATEMENT OF PROCEDURAL HISTORY

On October 13, 2016, the court of appeals, in a 2-1 panel decision written by now former Justice Dauphinot and joined by now former Justice Gardner reversed Appellant's sexual assault conviction on the basis of constitutional error in the exclusion of two en masse offers of defense evidence. *Golliday v. State*, No. 02-15-00416-CR, 2016 WL 5957022 (Tex.App.--Fort Worth Oct. 13, 2016) (available at Appendix B), *withdrawn and superseded,* ___ S.W.3d ___, 2017 WL 3196479 (Tex.App.--Worth July 27, 2017, pet. filed) (en banc). Justice Walker dissented without written opinion.

The State timely filed a motion for rehearing and a motion for reconsideration en banc on November 28, 2016. On December 30, 2016,

the panel overruled the State's motion for rehearing while the en banc court granted the State's motion for reconsideration en banc. *See* Order, *Golliday v. State*, No. 02-15-00416-CR.

On July 27, 2017, the en banc court (now expanded to include former Justices Dauphinot and Gardner) issued a 5-4 published opinion authored by former Justice Dauphinot (again) reversing Appellant's sexual assault conviction. *Golliday v. State*, __ S.W. 3d __, No. 02-15-00416-CR, 2017 WL 3196479 (Tex.App.--Fort Worth July 27, 2017, pet. filed) (en banc) (hereinafter *Golliday*, 2017 WL 3196479).

GROUNDS FOR REVIEW

1. Did the majority opinion correctly hold that TEX.R.EVID. 103 trumps TEX.R.APP. P. 33.1 and relieves an appellant of the need to have informed the trial court of the legal basis for admitting the proffered evidence? RR. III-86-96, 133-42.

2. Does the majority opinion conflict with precedent from this Court when it holds that an appellate complaint about the exclusion of defense evidence need not comport with the appellant's trial objection? RR. III-95, 141, 153.

3. Did the majority opinion contradict this Court's precedent by holding, in the alternative, that Appellant preserved his

constitutional complaints about the exclusion of defense evidence with, among other things, a general remark, made during opening statement, and his argument that the victim's testimony from the first voir dire hearing was relevant so the jury could "get the whole picture"? RR. III-95, 153.

4. Did the majority opinion properly deal with Appellant's en masse first offer by plucking out items when the offer contained other material that was inadmissible? RR. III-86-96, 135-42.

5. Did the majority opinion correctly find constitutional violations in the exclusion of defense evidence? RR. III-86-96, 133-42.

REASONS FOR REVIEW

Numerous reasons why this Court should grant discretionary review include:

(1) The majority opinion has decided important issues in an manner that conflicts with this Court's decisions, *see* TEX.R.APP. P. 66.3(c). Those conflicting holdings include:

(a) appellate complaints about the exclusion of defense evidence need not comport with the legal theory asserted for admission at trial;

(b) general comments made by defense counsel -- including a remark made during opening statement about bringing the jury "the rest of the story" -- are sufficient to make the trial court (and the State) aware that the defense is raising a constitutional complaint; and

(c) a defendant has an essentially unfettered right to present hearsay and derogatory information about a witness.

(2) The majority opinion conflicts with numerous decisions from other Texas intermediate appellate courts that have complied with this Court's holding in *Reyna* 168 S.W.3d at 179, *see* TEX.R.APP. P. 66.3(a);[1]

[1] The Fort Worth Court of Appeals seems to be the only Texas intermediate appellate court refusing to follow *Reyna*. *See, e.g., In re E.H.*, 512 S.W.3d 580, 587 (Tex.App.--El Paso 2017, no pet.) (confrontation issue forfeited

(3) The court of appeals justices have disagreed (5-4) on material questions of law necessary to the decision, *see* TEX.R.APP. P. 66.3(e);

(4) The majority opinion's misconstruction of TEX.R.EVID. 103(a)(2) and TEX.R.APP. P. 33.1 justifies review by this Court, *see* TEX.R.APP. P. 66.3(d); and

(5) The majority opinion has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, *see* TEX.R.APP. P. 66.3(f). Neither *Reyna* nor *Anderson* are cited in the majority opinion, even though the State and the dissent each made it clear that the majority opinion's holding(s) could not be reconciled with *Reyna* and *Anderson*.

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at trial where defendant did not put trial court on notice that his proffered evidence was admissible under Confrontation Clause); *In re A.V.*, No. 11-16-00078-CV, 2017 WL 2484348, at *1 (Tex.App.--Eastland June 8, 2017, no pet.) (mem.op.) (failure to explain at trial why hearsay rule didn't bar defense evidence forfeited such complaints on appeal).

ARGUMENT

Appellant's en masse offers and trial objections

Appellant was granted two voir dire hearings at trial. The first hearing involved eight items of evidence related to the sexual-assault victim's psychiatric treatment at Millwood. The second voir dire hearing concerned the testimony of the Sexual Assault Nurse Examiner (SANE) about statements made to her by the victim. At the end of each of these voir dire hearings, Appellant made a global objection that all the evidence within the hearing was admissible. RR. III-95 ("this testimony is relevant"); RR. III-141 ("I think that's relevant").[2]

The en banc majority opinion holdings

The majority opinion identifies eight items of evidence from the victim's testimony that Appellant attempted to introduce after the first voir dire hearing. *Golliday*, 2017 WL 3196479, at *8-9. In contrast, the majority opinion doesn't identify individual items from the SANE's

[2] As will be discussed with regard to Grounds Three and Four, there were some other non-constitutional objections.

testimony at the second voir dire hearing. *Id.* at *9 ("trial court prevented Appellant from cross-examining [SANE] fully"); *id.* at *6 (excluded testimony from SANE "supported Appellant's defense").

Among the comments that the majority opinion identifies as preserving constitutional complaints about the earlier exclusions of defense evidence was this portion of Appellant's opening statement:

> [W]hat I want to submit to you, as many of us remember, there's a fellow named Paul Harvey. He used to say, "Now the rest of the story." And that's where we're going.
>
> And we intend to prove to you . . . that this was not a thorough investigation, that shortcuts were made, that there are witnesses that we're going to bring to you that are going to fill in a lot of the gaps . . . .

RR. III-153 (emphasis added). The majority opinion invokes this opening-statement comment three times in support of its holding that Appellant "effectively communicated" to the trial court his constitutional evidentiary complaints. *Golliday*, 2017 WL 3196479, at *4; *see also id.* at *9, *10.

The majority held that eight items from the first proffer were constitutionally required to be admitted. *Id.* at *9. The majority apparently held that everything from the second hearing was constitutionally required to be admitted – though the opinion fails to explain what that evidence was. *Id.*

Finally, the majority opinion found reversible error under TEX.R.APP. P. 44.2(a)'s constitutional harm standard. *Golliday*, 2017 WL 3196479, at *9-10. This holding relied upon error in the exclusion of all of the evidence referenced in the majority opinion.

The en banc dissent

The dissent first faults the majority opinion for refusing to comply with binding precedent from this Court (as well as precedential decisions out of their own court) when it relied on TEX.R.EVID. 103 to excuse Appellant from telling the trial court the legal basis for admission. *Golliday*, 2017 WL 3196479 at *13 (Livingston, C.J., dissenting) ("The

court of criminal appeals rejected this exact argument in *Reyna*, 168 S.W.3d at 176-80.").

Next, the dissent tackles the majority opinion's alternative holding that Appellant preserved his constitutional complaint(s) by: (1) alluding, during opening statement, to the defense giving the jury "the rest of the story," RR. III-153, and (2) proffering all of the victim's testimony from the first voir dire hearing so as to give the jury "the whole picture." RR. III-95. The dissent explains that Appellant didn't make constitutional trial objections regarding the exclusion of defense evidence. *Golliday*, 2017 WL 3196479, at *11-12 (Livingston, C.J., dissenting). The dissent further points out that the majority opinion's alternative holding contravenes TEX.R.APP. P. 33.1(a) and *Reyna*. *Golliday*, 2017 WL 3196479, at *14-15 (Livingston, C.J., dissenting) (discussing *Reyna*'s suffer-the-consequences rule).

I. GROUNDS ONE AND TWO: *The majority holding that Appellant's complaints on appeal need not comport with the legal theory advanced for their admission at trial is contrary to TEX.R.APP. P. 33.1, and binding precedent.*

The majority opinion holds that TEX.R.EVID. 103(a)(2) relieves an appellant of the need to have informed the trial court of the legal basis for admitting the excluded evidence. *Golliday*, 2017 WL 3196479, at *3-4. This holding effectively repeals Rule 33.1 whenever defense evidence is excluded.

Rule 103(a)(2) addresses offers of proof -- *i.e.*, telling the trial court what evidence a party wishes to introduce. Rule 103 has nothing to do with Rule 33.1's appellate-preservation requirement -- *i.e.*, an appellant, to preserve error, must have informed the trial court why his proffer was admissible.

The holding in this case contravenes Rule 33.1 and this Court's holdings in *Reyna* and *Anderson*. As explained by the dissent and the State below, *Reyna* addressed and rejected the majority's notion that Rule 103 trumps Rule 33.1. *Golliday*, 2017 WL 3196479, at *12 (Livingston,

C.J., dissenting); State's coa br. at 13-14; State's Mot. for Reconsideration En Banc at 7-14. Under these circumstances, the majority opinion does not address every dispositive issue as TEX.R.APP. P. 47.1 demands. *See Salinas v. State*, No. PD-0332-17 (Tex.Crim.App. Sept. 13, 2017) (not published) (case summarily remanded where court of appeals failed to address controlling case law).[3]

II. GROUND THREE: *The majority opinion's alternative holding that Appellant preserved a claim of constitutional error in the exclusion of evidence by nonspecific and/or ambiguous comments contradicts Reyna and Rule 33.1.*

The majority alternatively found that Appellant preserved a constitutional complaint about the exclusion of evidence by: (1) the Paul Harvey opening-statement comment; and (2) a legally meaningless reference to "the whole picture." *Golliday*, 2017 WL 3196479, at *4. The majority also asserts that "Appellant's bill preserving error covers more

[3] Cited as an example only. TEX.R.APP. P. 77.3.

than fifteen pages and includes multiple explanations of grounds for admissibility of the evidence." *Id.* at *9.

A. *Appellant made no constitutional objection at the first voir dire hearing.*

During the first voir dire hearing (RR. III-86-95) Appellant's only legal objection was: "[W]e would submit that all of this testimony is relevant and should come before the jury so the jury can get the whole picture of the situation." RR. III-95 (emphasis added).[4] Of particular note is Appellant's failure to respond to the State's objections that Appellant's first proffer contained hearsay. RR. III-91, 95.

[4] In order to transmute a comment about giving the jury "the whole picture" into a constitutional complaint, one would have to start with a heavy presumption that a constitutional complaint was intended. Accordingly, the opinion also violates binding precedent predating *Reyna*. *Wright v. State*, 28 S.W.3d 526, 536 (Tex.Crim.App. 2000) (hearsay and TEX.R.EVID. 107 objections didn't preserve Confrontation clause complaint).

B. *Appellant made no constitutional objection in the second voir dire hearing.*

During the second voir dire hearing -- concerning the SANE examination (RR. III-135-41) -- Appellant's main objection was a contention that the SANE should be permitted to testify about the effects of combining alcohol and Xanax: "I think that's relevant to explaining some of [the sexual-assault victim's] behavior that evening." RR. III-141 (emphasis added). Other non-constitutional objections included: RR. III-131-32 (door opened to evidence of medication, herpes and anxiety diagnosis); RR. III-134 (use of medication and alcohol relevant); RR. III-143 (same).

C. *Appellant made no constitutional evidentiary objection during his opening statement.*

Appellant's opening statement about Paul Harvey and "the rest of the story" told the jury what the defense "intend[ed] to prove" (RR. III-153); it wasn't a complaint about an earlier evidentiary ruling. The majority's repeated reliance on this remark also ignores the fact that

Appellant's opening-statement comment didn't provoke an adverse ruling. RR. III-153; *see Allen v. State*, 473 S.W.3d 426, 442 (Tex.App.--Houston [14th Dist.] 2015) (lack of ruling forfeited complaint), *pet. dism'd*, 517 S.W.3d 111 (Tex.Crim.App. 2017).

D. *The majority opinion's attempt to spin straw into gold conflicts with Reyna.*

The majority's transmutation of Appellant's trial objections (and comments) constitutes a second repudiation of this Court's decision in *Reyna*. As the dissenters accurately point out, not even Appellant contended that the statements identified by the majority preserved Appellant's constitutional complaints on appeal. *Golliday*, 2017 WL 3196479 at *15 (Livingston, C.J., dissenting) ("Nor has appellant ever argued that the 'get the whole picture' or 'rest of the story' comments raised constitutional complaints.").

In *Reyna*, this Court held that where a trial court excludes a defendant's proffer and the defendant's rationale for admission is unclear, the defendant must "suffer on appeal the consequences of his

insufficiently specific offer." *Reyna*, 168 S.W.3d at 179. The majority turns *Reyna* on its head by attempting to turn ambiguity into a weapon for Appellant.

Even ignoring *Reyna's* suffer-the-consequences rule, constitutional complaints are not preserved by comments in an opening statement about "the story" or by comments made when the evidence is excluded about the "whole picture." *Smallwood v. State*, 471 S.W.3d 601, 614 (Tex.App.--Fort Worth 2015, pet. ref'd) ("credibility" objection didn't preserve constitutional complaint).

The net result of *Golliday* will be to make trial courts fearful that the objections they are being asked to rule on are not the complaints that will be addressed on appeal.

IV. GROUND FOUR: *Many of the items of evidence forming the majority's basis for reversal were commingled with clearly inadmissible evidence in an en masse offer.*

The State argued on appeal that the en-masse nature of Appellant's first proffer meant that Appellant's claims fail if anything in that en

masse offer was inadmissible. The only separately offered part of the first proffer was the victim's alleged out-of-court statement that she hadn't completely accepted she had been raped. RR. III-95.

Setting aside the accepting-being-raped item, there were seven evidentiary items identified by the majority from the first bill that were part of an en masse offer. Accordingly, even if Appellant had made a constitutional objection regarding the first bill, none of those seven items could be improperly excluded if there was anything inadmissible in the en masse offer. *Jones v. State*, 843 S.W.2d 487, 492 (Tex.Crim.App. 1992) (where defendant offered grand jury testimony that was partly admissible and partly inadmissible, trial court could exclude all of it without fear of reversal), *overruled on other grounds by Maxwell v. State*, 48 S.W.3d 196 (Tex.Crim.App. 2001).

The "rotten apples" spoiling Appellant's first en masse proffer, that the majority opinion never acknowledged, included:

- The prosecutor and the defense have access to the victim's psychiatric records. RR. III-87;

- The victim had a very difficult past. RR. III-90;
- The victim denied saying that the Navy took the word of her abusive husband over her word. RR. III-89-90; and
- The victim denied saying that her best friend didn't believe the victim's claim that she was raped. RR. III-91-92.

There is no argument to be made that any of these items were constitutionally required to be admitted. Further, Items Three and Four requested hearsay and the majority made no holding that the hearsay rule is unconstitutional. *See Walters v. State*, 247 S.W.3d 204, 219 (Tex.Crim.App. 2007) (application of a rule of evidence doesn't offend the constitution unless "a state evidentiary rule categorically and arbitrarily prohibits the defendant from offering otherwise relevant, reliable evidence vital to his defense").

Finally, many of the items actually identified by the majority were clearly inadmissible. For example, the victim's alleged hearsay statement that she is a "love addict," or that she is a "giant problem."

Even ignoring the lack of constitutional objections at trial, the en masse nature of Appellant's first proffer renders improper the majority's reliance on large amounts of evidence to find reversible error.

V. GROUND FIVE: *The majority opinion improperly found Due Process and Confrontation Clause violations in the portions of the bills of review that the majority addressed.*

The majority's explanation for why there were more than eight instances of constitutional error regarding the first bill consists of one short paragraph. *Golliday*, 2017 WL 3196479, at *9. No effort is made to explain why any individual item of the first proffer was constitutionally required to be admitted. Regarding the second proffer, the SANE's voir dire testimony is barely described. Much less is there an attempt to justify a finding of constitutional error.

Aside from there being essentially no analysis at all, this summary declaration of error invites any future defendant to invoke this opinion as requiring a trial court to allow admission of virtually any evidence that

a defendant declares is needed to: (1) "fully impeach" a victim; or (2) show a victim is "unreliable."

A. *The majority opinion overlooks the problem that most of the items it concludes were constitutionally required to be admitted were hearsay.*

Despite the State's hearsay objections at trial and hearsay arguments on appeal, the majority treated the hearsay nature of Appellant's proffered evidence in the first bill -- the out-of-court comments from (1) persons at Millwood, and (2) the victim -- as a non-issue. In so doing, the majority erred. *Walters*, 247 S.W.3d at 219.

There is nothing categorical or arbitrary about the Texas Hearsay Rules. Further, it should be noted that Appellant cannot contend that he wasn't offering these out-of-court statements for their truth because Appellant never so informed the trial court. TEX.R.EVID. 105(b)(2). Moreover, Appellant was plainly offering these statements for their truth.

Regarding the second bill, the majority identified Rules 107 and 803(4) as solutions to the hearsay problem. *Golliday*, 2017 WL 3196479, at *9. First, the State didn't go into the victim's full medical history and instead asked about why the victim came to the SANE. RR. III-103-04. So any claim that State broadly inquired about the victim's medical history is erroneous. Second, Appellant's opened-the-door objection and Rule 803(4) objections related to only some of the SANE's proposed evidence. RR. III-131 (medication and herpes); RR. III-141 (mixing alcohol and medication). Third, Rule 107 didn't require admission of the SANE proffer just because the SANE discussed the rape exam. *Sauceda v. State*, 129 S.W.3d 116, 123 (Tex.Crim.App. 2004) ("in order to be admitted under the rule, the omitted portion of the statement must be 'on the same subject' and must be 'necessary to make it fully understood,'" quoting Rule 107).

B. *The majority opinion's unexplained finding of constitutional error seems to rely upon a belief that Appellant had a right to cast the victim as a "floozy" and a "nut," generally.*

The closest the majority comes to explaining why there was a constitutional violation regarding the first proffer is to declare that Appellant was prevented from showing why the victim's "testimony was unreliable." *Golliday*, 2017 WL 3196479, at *9. If this case is not reversed, the bench and bar will be forced to wonder how there was a constitutional violation in excluding:

- "I'm a love addict and it sucks;"
- The victim said she had not accepted the fact that she had been raped;
- "Therapist stated that it sounded like patient learned to manipulate men . . . .";
- Victim believed that she was "a giant problem" to everyone;
- Victim had been assaulted by her roommate's husband, but the charges were dropped;

- Someone in the emergency room had given the victim Xanax for a panic attack;
- Victim was on anti-anxiety medication before, and at the time of, the alleged rape. She took Zoloft for anxiety and took it with alcohol. She stated outside the jury's hearing, "I'm a recovering alcoholic. I drink alcohol with everything."

See Golliday, 2017 WL 3196479, at *8-9.

The majority found the evidence to be constitutionally admissible on a theory of attacking the victim's general credibility as described in *Hammer v. State*, 296 S.W.3d 555, 561 (Tex.Crim.App. 2009) and *Johnson v. State*, 490 S.W.3d 895, 909 (Tex.Crim.App. 2016). *Johnson*, however, recognizes that a "defendant does not have an absolute right to impeach the general credibility of a witness." *Johnson*, 490 S.W.3d at 910.

An attack on a witness's credibility requires that there be probative value in the evidence. A victim's past claim of sexual abuse, for example, has to be shown to be false. *Lopez v. State*, 18 S.W.3d 220, 225 (Tex.Crim.App. 2000). Hearsay statements by the victim regarding

acceptance or such as she is a "love addict," or "a giant problem," or the statement that someone thought the victim "had learned to manipulate men" all lack probative value in the same way as a victim's prior claim of abuse. That is, they tell the jury nothing about the victim's credibility.

Trying to apply that rationale to evidence such as the sexual-assault victim having herpes or might have said that she was a "love addict" suggests that Appellant had a constitutional right to imply to the jury that the victim was a "floozy."[5] *Golliday*, 2017 WL 3196479, at *3 (Appellant's defense was consent, not promiscuity).

There is no promiscuity defense in Texas. *Ray v. State*, 119 S.W.3d 454, 458 (Tex.App.--Fort Worth 2003, pet. ref'd). The majority's holding that Appellant had a right to present such evidence violates TEX.R.EVID. 412 and 608(b).[6]

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[5] The only other theory imaginable is that the majority regards a divorced woman having an STD as a condition -- akin to a felony conviction -- that inherently renders her less credible. An ugly notion, but no less ugly than a contention that STD evidence supports a claim of consent.

[6] Under Rule 107, the fact that the State asked about a rape exam would not make herpes evidence admissible. *Scott v. State*, No. 02-03-458-CR, 2005 WL 555278, at *1 (Tex.App.--Fort Worth Mar. 10, 2005, no pet.) (mem.op., not

Even if the majority was wrong to say that Appellant's defense was consent, the herpes evidence would be barred by TEX.R.EVID. 412 because Appellant failed to show that: (1) herpes could have been easily transmitted to Appellant, and (2) Appellant had not contracted herpes. *See, e.g.,*

- *Smith v. State*, 737 S.W.2d 910, 914-15 (Tex.App.--Fort Worth 1987, pet. ref 'd) (victim's gonorrhea not material to a fact at issue -- no tests had been performed to determine whether defendant had gonorrhea);
- *Johnson v. State*, 651 S.W.2d 434, 436-37 (Tex.App.--Dallas 1983, no pet.) (victim's STD properly excluded where defendant failed "to show that he was in fact clear of the disease").

Whether the victim "manipulates" men, or is a "love addict," or whether her friend believes her are all matters that are plainly

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designated for publication) (no Rule 107 error in redacting STD from sexual assault examination, citing *West v. State*, 121 S.W.3d 95, 103 (Tex.App.--Fort Worth 2003, pet. ref'd)).

irrelevant. *Tollett v. State*, 422 S.W.3d 886, 893 (Tex.App.--Houston [14th Dist.] 2014, pet. ref'd) (no constitutional right to cross examine officer concerning his misbehavior six years earlier in a different matter: "Appellant's purpose for presenting this evidence was general character assassination, which Rule 608(b) prohibits.").

The victim's report that she had been previously assaulted by her roommate's husband was not admissible as there was no showing that this accusation was false. *Lopez*, 18 S.W.3d at 226. The majority's implication the victim's possible statement about a stage of grief, acceptance, was required to be admitted because it could be cast as a denial of rape, is akin to a claim that a victim's prior accusation is always admissible because it can be cast as false.

According to Appellant's counsel at trial, the victim's diagnosis was "anxiety." RR. III-143; *see also* RR. III-93 (victim testifies that she thinks she told SANE she was suffering from anxiety). A diagnosis of "anxiety" presents no basis for a conclusion that the victim's perception or recall was distorted. Nor does a panic attack when obtaining treatment for

sexual assault reflect on a person's credibility. *Virts v. State*, 739 S.W.2d 25, 30 (Tex.Crim.App. 1987); *see also Scott v. State*, 162 S.W.3d 397, 401-02 (Tex.App.--Beaumont 2005, pet. ref'd) (upholding limitation of cross-examination evidence where it didn't show witness's mental illness affected his perception of events at issue).

There was no expert evidence to support a claim that medication distorted the victim's perception or recall. Moreover, the medication testimony was tied together in an en masse offer with inadmissible evidence.

C. *The SANE's voir dire*

As mentioned, the opinion provides no explanation for why there is constitutional error regarding the exclusion of the SANE's testimony. The SANE proffer consisted primarily of: (1) the victim's statement that she takes Xanax and Zoloft; (2) an opinion about the effects of mixing medications with alcohol; (3) the victim's report of suffering from anxiety; and (4) the victim's report of suffering from herpes. RR. III-135, 138,

139.[7] The State has already addressed the matters of herpes and anxiety. The SANE admitted that she lacked the expertise to provide an opinion on mixing drugs and alcohol, RR. III-135, and the State objected on that basis. RR. III-141. Appellant provided the trial court with no basis to support impeachment of the victim on the basis of her medication. *See Morgan v. State*, 785 S.E.2d 667, 670 (Ga.Ct.App. 2016) (where defendant did not attempt to qualify SANE nurse as an expert on the side effects of psychiatric medication, defendant had no person who could offer such testimony).

D. *The majority opinion accords no authority to the trial court to prevent harassment, prejudice and confusion of the issues.*

The Sixth Amendment doesn't prevent a trial judge from limiting cross-examination on concerns about, among other things, harassment, prejudice, confusion of the issues or interrogation that is repetitive or

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[7] Also included in the evidence that the majority held was constitutionally required to be admitted was evidence that the SANE: (1) treated the victim with a "pregnancy prophylaxis;" and (2) didn't know about warnings for Xanax and Zoloft use. RR. III-136-37, 139.

only marginally relevant. *Hammer*, 296 S.W.3d at 561 n.7. In *Johnson*, this Court implied that a trial court's expression of concern about harassment is a precondition to sustaining an exclusion of evidence on that basis. *Johnson*, 490 S.W.3d at 911. Such a notion is contrary to the well-settled doctrine that a trial court must be affirmed even if he is right for the wrong reason. *De La Paz v. State*, 279 S.W.3d 336, 344 (Tex.Crim.App. 2009). In the present case, the fact that the trial court didn't discuss harassment, in excluding Appellant's evidence, is only further evidence that there wasn't a constitutional objection presented to the trial court. RR. II-95, 142.

The victim admitted to the jury that: (1) she was intoxicated, RR. III-41; (2) she had flirted with Appellant, RR. III-45; and (3) she had a poor memory of the events. RR. III-52-53. The victim's memory was rendered largely superfluous by the victim's 9-1-1 call, SX-30, and her report to the SANE. RR. III-104-06. In that light, Appellant's interest in the victim's mental-health history and the causes of her memory

problems are shown to be little more than attempts to unfairly bias the jury against the victim.

Few victims will be free of having said odd things or (as in the case of the manipulation comment) having had unpleasant things said about them at some point in their pasts. Sexual assault trials should not devolve into litigating whether such past statements disqualify a person from seeking justice.

CONCLUSION

The majority, in finding that Appellant's constitutional complaints were preserved, fails to comply with this Court's binding precedent.

The majority's handling of the merits of Appellant's complaint is equally flawed. The majority effectively creates a rule that a defendant has a constitutional right to introduce anything that makes a victim look bad. There is no other way to spin the majority's findings of constitutional error in excluding evidence such as the victim's out-of-court statements "I'm a love addict" and "a giant problem."

PRAYER

The State prays that this petition be granted; that the court of appeals' judgment be reversed; and that the cause then be remanded to the court of appeals for disposition of Appellant's remaining issues (Issues Three, Four and Five). Alternatively, the State prays that the case be summarily remanded with instructions that the court of appeals address this Court's controlling decisions in *Reyna* and *Anderson*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

There are 4,493 words in the portions of the document covered by TEX.R.APP. P. 9.4(i)(1).

/s/ David M. Curl
DAVID M. CURL, Assistant
Criminal District Attorney

CERTIFICATE OF SERVICE

A copy of the State's Petition for Discretionary Review has been electronically sent to counsel for Appellant Joshua Golliday, Mr. Don Hase, at DHnotices@ballhase.com, and the State Prosecuting Attorney, Ms. Stacey M. Soule, State Prosecuting Attorney, at information@spa.texas.gov, on the 27th day of September 2017.

/s/ David M. Curl
DAVID M. CURL, Assistant
Criminal District Attorney

APPENDIX A
THE MAJORITY OPINION AND DISSENT

2017 WL 3196479
Only the Westlaw citation is currently available.

Court of Appeals of Texas,
Fort Worth.

Joshua GOLLIDAY, Appellant
v.
The STATE of Texas, State

NO. 02-15-00416-CR
|
DELIVERED: July 27, 2017

Synopsis

Background: Defendant was convicted in the 371st District Court, Tarrant County, No. 1379815D, Mollee Westfall, J., of sexual assault. Defendant appealed.

Holdings: On rehearing en banc, the Court of Appeals, Lee Ann Dauphinot, J., held that:

[1] defendant preserved for appellate review his claim that trial court erred in excluding impeachment evidence concerning complainant;

[2] defendant adequately briefed appellate claim regarding exclusion of impeachment evidence;

[3] trial court's refusal to allow defendant to cross-examine complainant and sexual assault nurse evaluator violated defendant's rights to confrontation and due process; and

[4] trial court's error was harmful and thus constituted reversible error.

Reversed and remanded.

Livingston, C.J., filed dissenting opinion in which Walker, Gabriel, and Kerr, JJ., joined.

West Headnotes (9)

[1] **Criminal Law**

Defendant preserved for appellate review in prosecution for sexual assault his claim that trial court erred in excluding impeachment evidence concerning complainant during cross-examinations of complainant and sexual assault nurse examiner (SANE), where defendant told trial court clearly what evidence he wanted jury to hear, prosecution objected, and trial court sustained objections. Tex. R. Evid. 103(a)(2).

Cases that cite this headnote

[2] **Criminal Law**

When evidence is improperly admitted, objection is required to preserve the complaint for appellate review. Tex. R. Evid. 103(a)(1).

Cases that cite this headnote

[3] **Criminal Law**

When evidence is improperly excluded, no objection is required to preserve the matter for appellate review, but a proper offer of proof is required. Tex. R. Evid. 103(a)(2).

Cases that cite this headnote

[4] **Criminal Law**

To preserve as error the exclusion of evidence

because the defendant is not permitted to question a State's witness about matters that might affect the witness's credibility, i.e., matters which might show malice, ill feeling, ill will, bias, prejudice, or animus, the defendant need not show what his cross-examination of the witness would have affirmatively established; he must merely establish what general subject matter he desired to examine the witness about during his cross-examination and, if challenged, show on the record why such should be admitted into evidence. Tex. R. Evid. 103.

Cases that cite this headnote

[5] **Criminal Law**

Defendant preserved for appellate review his claim that trial court's exclusion of impeachment evidence concerning alleged victim during cross-examinations of alleged victim and sexual assault nurse examiner (SANE) violated defendant's rights to due process and confrontation in prosecution for sexual assault, where defendant effectively communicated to trial court that complained-of rulings denied him right to present his defense and prevented him from telling jury "the rest of the story" so they "c[ould] get the whole picture." U.S. Const. Amends. 6, 14.

Cases that cite this headnote

[6] **Criminal Law**

A party need not spout magic words to preserve an issue for appellate review as long as the basis of his complaint is evident to the trial court.

Cases that cite this headnote

[7] **Criminal Law**

Defendant adequately briefed for appellate review his claim that trial court's exclusion of impeachment evidence concerning complainant during cross-examinations of complainant and sexual assault nurse examiner (SANE) violated defendant's rights to due process and confrontation in prosecution for sexual assault, where defendant's stated points explicitly raised issues of confrontation, cross-examination, and due process, defendant quoted and emphasized excerpt from a case from Court of Criminal Appeals, and defendant relied on that case in raising his complaint about trial court's denying him the right to present his defense. U.S. Const. Amends. 6, 14.

Cases that cite this headnote

[8] **Constitutional Law**

Trial court's refusal to allow defendant charged with sexual assault to cross-examine complainant, who testified outside jury's presence that she was on medication at time of alleged assault and that she was recovering alcoholic and drank alcohol with prescription medication, and sexual assault nurse evaluator, who testified outside jury's presence that complainant told her she took prescription medication and that mixing medication with alcohol could cause memory distortion and blackouts, violated defendant's rights to confrontation and due process; only issue was consent, and exclusion of evidence challenging complainant's ability to remember parts of evening, her ability to accurately perceive events, and her erratic behavior that might have affected defendant's perception of consent deprived him of right to offer a defense. U.S. Const. Amends. 6, 14.

Cases that cite this headnote

[9] **Appeal and Error**

Trial court's error of violating defendant's rights to confrontation and due process by refusing to allow defendant to cross-examine complainant, who testified outside jury's presence that she was on medication at time of alleged assault, and sexual assault nurse evaluator, who testified outside jury's presence that complainant told her she took prescription medication and that mixing medication with alcohol could cause memory distortion and blackouts, was harmful and thus constituted reversible error in prosecution for sexual assault; jury did not hear evidence that would have allowed them to judge complainant's credibility and her ability accurately to report events as well as her motives and biases. U.S. Const. Amends. 6, 14; Tex. R. App. P. 44.2(a).

Cases that cite this headnote

FROM THE 371ST DISTRICT COURT OF TARRANT COUNTY, TRIAL COURT NO. 1379815D

Attorneys and Law Firms

Don Hase, Arlington, for Appellant.

David M. Curl, Debra A. Windsor, Fort Worth, for State.

Before the court en banc.

OPINION ON THE STATE'S MOTION FOR EN BANC[1] RECONSIDERATION

LEE ANN DAUPHINOT, JUSTICE

***1** After the majority of a panel of this court issued an opinion reversing the trial court's judgment of conviction, the State filed a motion for rehearing en banc. We granted the State's motion and ordered resubmission of the appeal without oral argument. After considering the arguments presented by the parties upon the original submission of this appeal, we withdraw our opinion and judgment dated October 13, 2016 and substitute the following.

A jury convicted Appellant Joshua Golliday of sexual assault, charged in a single-count indictment and alleged to have occurred on or about January 5, 2013. The jury assessed his punishment at two years' confinement and recommended that imposition of sentence be suspended and that Appellant be placed on community supervision. The trial court sentenced Appellant accordingly, assessing a seven-year term of community supervision. Appellant brings five points on appeal, challenging the trial court's limitations on his cross-examination and on his ability to present character evidence and contending that the State's argument constituted a comment on his silence and that the cumulative effect of trial errors was harmful. Because we hold that the trial court erroneously limited Appellant's right to present his defense, we sustain his first two points, reverse the trial court's judgment, and remand this cause to the trial court.

Factual and Procedural Background

Complainant is a woman who lived at The Depot apartment complex in downtown Fort Worth. She testified that her apartment, number 333, was on the second floor; later she testified that she did not remember whether her apartment was on the second or third floor, but she thought it might be on the third.

Complainant was involved in a car wreck on January 4, 2013, and although she was not injured, she lost the use of her car. When she returned to her apartment, she began to drink alcohol and planned to continue drinking both in her apartment and during an evening out. She went out alone in downtown Fort Worth to Dirty Murphy's, not to socialize or to have a good time, but just to drink beer and wine. She returned to her apartment after midnight, changed into her pajamas, continued to drink wine, and started watching a movie. She described herself as intoxicated.

Complainant went out into the hallway to smoke, and she found neighbors smoking and drinking, so she stayed outside smoking and talking to them. Complainant testified that she had run out of cigarettes and had "needed to bum one," but she could not remember at trial whether anyone gave her a cigarette. She did remember that she asked Appellant, who was in the group smoking outside her apartment, to take her to the store to buy cigarettes. Complainant testified that she was then wearing black pajama pants, a long-sleeve black pajama shirt, panties, and no bra.

At the convenience store, Complainant bought cigarettes and wanted to rent a movie. At trial, she did not remember whether Appellant went into the store or stayed in the vehicle. She also testified that there was some flirting going on. When they returned to the Depot, Complainant invited Appellant into her apartment to watch the movie with her, and she testified that she made herself a drink and thought she made him a drink. While they watched the movie, Complainant and Appellant began kissing consensually. In response to the prosecution's questioning, Complainant responded, "Things progressively happen [ed]. I don't—I don't remember everything exactly." Although she remembered Appellant's trying to touch her, she did not remember where he tried to touch her. She did remember that she was not okay with it and asked Appellant to leave. She testified that he responded, " 'I took you to the store,' like [she] owed him." "I don't know," she further stated to the jury.

***2** Complainant testified that when she told Appellant to leave, he grabbed her arms, turned her around, and pulled her pajama pants and panties off. When the prosecution asked her if she said anything to him, she replied, "I don't remember what I said. I just heard screaming in my head." She testified that he held her down and raped her. At trial, she testified that Appellant ejaculated, although she had told the detective investigating the incident that she was unsure whether Appellant ejaculated. She testified that she did not remember what she had told the detective. She also testified that after he raped her, Appellant ran out the front door, to the left and onto the parking lot. She had previously testified that she believed her apartment was on the third floor. Complainant testified that she put on her pajama pants, grabbed her phone, followed Appellant out onto the parking lot, and called 911.

When the defense asked Complainant on cross-examination whether she had been talking to someone on her cell phone in the stairwell before meeting up with her neighbors, she replied, "Possibly." She conceded that it was possible that she had told the police that she had been in the stairwell talking on her cell phone but said that she did not "remember." She also admitted that it was possible that the people in the hall had come into her apartment but denied remembering whether they had. The defense asked her more than once whether she spoke in person to anyone other than Appellant and his friends. She denied she had but also testified, "Not that I remember." Although she denied remembering what she and Appellant had talked about, she admitted that he had told her that he was from San Diego. On cross-examination, the defense asked Complainant whether she had initiated the kissing. She denied having a memory of it but conceded that it was "[a]bsolutely" possible that she had initiated the kissing.

The defense began inquiring how Complainant had reached the hospital for the sexual assault examination. She testified that she had been taken by ambulance and that her friend Ryan Bradshaw had brought her home. But the trial court did not allow Appellant to inquire about Complainant's relationship with Bradshaw. Complainant denied that Bradshaw had been in her apartment earlier that day but admitted that he had likely driven her from her apartment to the police department for her interview with the investigating detective. Later she admitted that Bradshaw had in fact come to her apartment to take her to the police department because she had called him. Complainant admitted that Bradshaw had come into the interview room when the detective stepped out. She also admitted that he had stayed in the room with her for fifteen minutes and consoled her. The defense attempted to ask Complainant exactly how Bradshaw had comforted her, but the trial court would not allow the questions and sustained the State's objections.

The defense then attempted to further clarify the events of the evening, asking whether Complainant had actually been in the hallway arguing with Bradshaw the evening she claimed she had gone into the hallway to smoke. Again, her testimony waffled, and she testified, "I honestly don't remember all the details of that day." In response to this admission, the defense asked, "Is it possible that Ryan was at your apartment and the two of you were arguing before these four guys [Appellant and his friends] got involved?" Complainant replied, "I guess it could be possible." Complainant also admitted she did not remember what she had told the investigating detective or what she had told the examining nurse about whether Appellant had ejaculated or where he had tried to touch her.

Outside the presence of the jury, the defense inquired about Complainant's statements that she made to treatment providers while she was a patient at Millwood, a substance abuse treatment facility that provided Complainant both out-patient and in-patient treatment after the alleged assault. The defense also asked Complainant about statements she made to the sexual assault nurse examiner (SANE) who performed her sexual assault examination. The defense attempted to elicit testimony that Complainant had said

> ***3** • that she had not accepted the fact that she was raped;

> • that she was a love addict;
>
> • that she had previously accused a friend's husband of assaulting her;
>
> • that she had herpes; and
>
> • that she was mixing Zoloft with alcohol on the night in question.

Complainant testified outside the presence of the jury while the defense was making its proffer,

> Q. ... And you also know you're not supposed to take alcohol with Zoloft; is that correct?
>
> A. I'm a recovering alcoholic. I drink alcohol with everything.

The prosecution objected that the proffered testimony was hearsay, not relevant to the elements of the case, and inadmissible under evidentiary rule 404. The defense argued that the evidence was relevant and admissible so the jury "c[ould] get the whole picture of the situation." The visiting judge sustained the prosecution's objections. The defense then asked if, without mentioning Millwood, it could at least ask Complainant whether she had stated that she had not completely accepted the fact that she had been raped. The judge again sustained the prosecution's hearsay objection. The defense pointed out that the witness's statement was admissible, but the trial court again sustained the objection. The defense then asked if all the matters covered by the proffer would be excluded and the judge stated that they would be. The defense excepted to the ruling.

Before the jury, the defense asked Complainant whether she had testified she did not scream out when the alleged assault was occurring. She corrected counsel, stating, "No, I did not say that. I said I don't remember screaming. All I can hear is screaming in my head." She admitted that she did not remember "a lot of details."

Denial of Appellant's Right to Present His Defense

This is a traditional "he said, she said" case, a swearing match between Appellant and Complainant. The issue of sexual intercourse was uncontested. The only contested issue was consent. Appellant's defense was not promiscuity. It was that the sexual activity was consensual. At the very least, the defense was that a reasonable person would have believed the sexual activity was consensual. The excluded testimony was offered to show Complainant's inability to recall the events and to explain her conduct on the night of the alleged assault.

The Issues

In his first two points, Appellant argues that the trial court abused its discretion and erred by limiting his cross-examination of Complainant and the SANE, violating his constitutional rights to due process and confrontation. Within the discussion of his points, he also contends that the trial court's error violated his constitutional right to present his defense.

Preservation

[1]The State argues that Appellant's first and second issues are "improperly presented" and not preserved and, that, consequently, this court should not consider them. We disagree.

Both the State and the conscientious dissent confuse the requirements for preserving a complaint that evidence was improperly excluded with the requirements for preserving a complaint that evidence was improperly admitted. The dissent relies on *Vasquez v. State*,[2] a case addressing preservation of error when evidence is improperly admitted, for the requirements for preserving error when evidence is improperly excluded. Respectfully, the dissent's contention that objection is required to preserve a complaint that evidence is improperly excluded is incorrect.

***4** [2] [3] [4]Rule 103 of the rules of evidence establishes the distinctly different modes of preserving error in the admission of and in the exclusion of evidence:

> (a) Preserving a Claim of Error. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:
>
> (1) if the ruling *admits evidence*, a party, on the record:
>
> (A) timely objects or moves to strike; and
>
> (B) states the specific ground, unless it was apparent from the context; or
>
> (2) if the ruling *excludes evidence*, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.[3]

When evidence is improperly admitted, objection is required to preserve the complaint.[4] When evidence is

improperly excluded, no objection is required, but a proper offer of proof is required.[5] As the *Holmes* court has explained,

> This court has recognized a distinction between the general rule in Rule 103(a)(2) and the case in which the defendant is not permitted to question a State's witness about matters that might affect the witness's credibility. In the latter case, the defendant need not show what his cross-examination of the witness would have affirmatively established; he must merely establish what general subject matter he desired to examine the witness about during his cross-examination and, if challenged, show on the record why such should be admitted into evidence. In such a case the trial court's ruling has prevented a defendant from questioning a State's witness about subject matters which affect the witness's credibility, that is, matters which might show malice, ill feeling, ill will, bias, prejudice, or animus.[6]

Appellant did exactly what he was supposed to do. He told the trial court clearly what evidence he wanted the jury to hear, the prosecution objected, and the trial court sustained the objections, thereby holding that Appellant could not present his impeachment evidence before the jury. He therefore preserved his complaints about the exclusion of evidence.

[5] [6]Appellant also preserved his related constitutional complaints. Both criminal and civil courts in Texas have long recognized that our trials are not silly games of "Mother, may I?"[7] "[A] party need not spout magic words ... to preserve an issue as long as the basis of his complaint is evident to the trial court."[8] "Straightforward communication in plain English will always suffice."[9] Appellant made clear to the trial court that his defense was grounded in the evidence he sought to elicit in the cross-examinations he was blocked from presenting to the jury. That is, Appellant effectively communicated to the trial court that the complained-of rulings denied him the right to present his defense and prevented him from telling the jury "the rest of the story" so they "c[ould] get the whole picture." We therefore hold that Appellant preserved his points at trial.

Adequate Briefing

***5** [7]Appellant likewise makes clear to this court what his complaints are. His stated points explicitly raise issues of confrontation, cross-examination, and due process. He also quotes and emphasizes an excerpt from the Texas Court of Criminal Appeals's *Hammer* opinion, written by Judge Cochran for a unanimous court, and then relies on it in raising his complaint about the trial court's denying him the right to present his defense:

> **[T]he constitution is offended if the state evidentiary rule would prohibit him from cross-examining a witness concerning possible motives, bias, and prejudice to such an extent that he could not present a vital defensive theory**.
>
> *Hammer v. State*, 296 S.W.3d 555, 56[3] (Tex. Crim. App. 2009) [(]footnotes omitted; emphasis added[)].
> Here, the trial court's rulings did not allow jurors to fairly and fully evaluate the complainant's credibility and fully present a vital defensive theory.[10]

Thus, on appeal, Appellant clearly raises the trial court's improper denial of his constitutional rights of confrontation and cross-examination as well as the trial court's improper denial of his right to present his defense. These are the issues addressed by the Texas Court of Criminal Appeals in *Johnson v. State*,[11] and they are the essence of the *Crawford v. Washington*[12] decision. Appellant's issues are clearly presented, and his argument and contentions are easily understood by the court. We, therefore, hold that Appellant's complaints were preserved at trial and are adequately briefed in this court. We shall address Appellant's first and second points.

Substantive Law

Appellant argues that the trial court's exclusion of the evidence improperly limited cross-examination that would reveal Complainant's motive or bias and that it therefore violated his Sixth Amendment protections, quoting *Hammer*:

> Trials involving sexual assault may raise particular evidentiary and constitutional concerns because the credibility of both the complainant and defendant is a central, often dispositive, issue. Sexual assault cases are frequently "he said, she said" trials in which the jury must reach a unanimous verdict based solely upon two diametrically different versions of an event, unaided by any physical, scientific, or other corroborative evidence. Thus, the Texas Rules of Evidence, especially Rule 403, should be used sparingly to exclude relevant, otherwise admissible evidence that might bear upon the credibility of either the defendant or complainant in such "he said, she said" cases. And Texas law, as well as the federal constitution, requires great latitude when the evidence deals with a witness's specific bias, motive, or interest to testify in a particular fashion.
> But, as the Supreme Court noted in *Davis v. Alaska*, there is an important distinction between an attack on

> the general credibility of a witness and a more particular attack on credibility that reveals "possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand." Thus, under *Davis*, "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." However, as Justice Stewart noted in concurrence, the Court neither held nor suggested that the Constitution confers a right to impeach the general credibility of a witness through otherwise prohibited modes of cross-examination. Thus, the *Davis* Court did not hold that a defendant has an absolute constitutional right to impeach the general credibility of a witness in any fashion that he chooses. But the constitution is offended if the state evidentiary rule would prohibit him from cross-examining a witness concerning possible motives, bias, and prejudice to such an extent that he could not present a vital defensive theory.[13]

***6** And in *Carroll v. State*, the Texas Court of Criminal Appeals stated:

> The Constitutional right of confrontation is violated when appropriate cross-examination is limited. The scope of appropriate cross-examination is necessarily broad. A defendant is entitled to pursue all avenues of cross-examination reasonably calculated to expose a motive, bias or interest for the witness to testify. When discussing the breadth of that scope we have held,
>
> > ...[.] Evidence to show bias or interest of a witness in a cause covers *a wide range and the field of external circumstances from which probable bias or interest may be inferred is infinite. The rule encompasses all facts and circumstances, which when tested by human experience, tend to show that a witness may shade his testimony* for the purpose of helping to establish one side of the cause only.[14]

As Appellant points out, these words of the Texas Court of Criminal Appeals are applicable in this situation, where the trial court sustained the prosecutor's objections and limited Appellant's right to cross-examination.

Citing the discussion of the issue in *Virts v. State*,[15] Appellant argues that this rule also applies to the ability to cross-examine a witness regarding a mental state that might affect her ability accurately to perceive, to recall, and to recount the events to which the witness is called to testify:

> [T]his Court has often stated and discussed the fact that one of the greatest constitutional rights that an accused person might have is the right to confront and cross-examine the State's witnesses....
> ... [W]e believe that it is still necessary to point out, for emphasis purposes, that the right of cross-examination by the accused of a testifying State's witness includes the right to impeach the witness with relevant evidence that might reflect bias, interest, prejudice, inconsistent statements, traits of character affecting credibility, or evidence that might go to any impairment or disability affecting the witness's credibility.[16]

More recently, the Texas Court of Criminal Appeals has addressed the right of a person charged with a criminal offense to cross-examine his accuser on issues that would aid the jury in assessing the accuser's credibility. In *Johnson*, the Court reminded us that a defendant has a constitutional right to present his defense to the jury so that the jury may weigh his evidence along with the rest of the evidence presented.[17]

Analysis

Error

[8]The testimony the trial court excluded, both from the SANE and from Complainant, supported Appellant's defense at trial that Complainant's testimony, recollections, judgments of reality, and conduct rendered her claims of rape suspect and not worthy of belief. Before the jury, Complainant testified that she had gone out drinking. She returned to her apartment, put on her pajamas, continued drinking, went into the hall to smoke, and "needed to bum" a cigarette from one of the men in a nearby group of smokers. At trial, Complainant did not remember which floor her apartment was on or whether the men gave her a cigarette. She did remember that

***7** • she asked Appellant to take her to the store "to buy cigarettes after I—I don't remember";

• they drove to a gas station, bought cigarettes, and rented a movie; and

• they were flirting.

When they left the gas station, they went to Complainant's apartment, where she made a drink and "put the movie in." When asked whether she made a drink for Appellant, she replied, "I think so."

While they were watching the movie, Complainant and Appellant began kissing. At trial, the following exchange occurred between the prosecutor and Complainant:

Q. After some kissing, do things stop, or does anything else progressively happen?

A. Things progressively happen. I don't—I don't remember everything exactly.

Q. Okay. Do you remember, other than kissing, the Defendant trying to touch you?

A. Yes.

Q. Okay. Do you remember where he was trying to touch you?

A. No.

Complainant did remember that she was not "okay with the touching" and asked Appellant to leave. She testified that instead of leaving, he told her, "I took you to the store." She testified that she stood up and expected him to leave. She did not testify that she told him to leave a second time, but the prosecutor asked her what Appellant had done when she again told him to leave. She responded to the leading question that he grabbed her arms and turned her around. When asked if Appellant acted aggressively, she agreed that he did.

Complainant testified that Appellant pulled her pajama pants and panties off and that she resisted. But she also testified, "I don't remember what I said. I just heard screaming in my head." She testified that she heard Appellant unzip his pants, and then he raped her. Although he was behind her and she could not see him, she testified that she knew he did not use a condom. She also testified that Appellant ejaculated. When asked if she remembered telling a police officer that she did not know whether Appellant had ejaculated, she said she did not remember telling the officer that. Complainant testified that after raping her, Appellant ran "[o]ut the front door and to the left into the parking lot." This testimony is confusing if the assault occurred in her second- or third-floor apartment. While the prosecutor attempted to clarify for the jury what Complainant meant—by referring to and pointing to places on an unidentified exhibit, the cold appellate record does not provide similar aid to this court.

On cross-examination, Complainant testified that she did not remember

- whether she had told a police officer that she was talking on her cell phone in the stairwell before speaking to the men smoking in the hallway, but it was possible;
- whether she had invited the men into her apartment, but it was possible;
- how it was determined which store they would go to for cigarettes;
- whether Appellant went into the store with her or waited in the car;
- what movie they rented (but she did think she would have chosen it); or
- what she and Appellant talked about in the car and afterward in her apartment.

She did remember that both she and Appellant had been drinking and that they did talk on the way to the store.

***8** When defense counsel asked whether they had talked about Appellant's having moved a lot because his father was an evangelist, the prosecutor objected: "He's specifically trying to show he's a preacher's boy. That could resonate with them. There's plenty of other questions that could be asked." The trial court sustained the objection. The trial court also sustained the State's objection to an inquiry whether Appellant had told Complainant that he provided care for his mother, who had cancer.

Complainant's testimony then became even more confusing. She testified that the kissing was mutual but did not remember saying that she had initiated the kissing, although it was "absolutely possible" that she had initiated it. She testified that she did not remember telling the 911 officer that she did not know anything about Appellant, although she had just heard herself say it on the 911 recording played for the jury. Nor did she remember telling the officer on the scene that Appellant's name was Josh or Joshua and that he was from San Diego and now lived in Arlington. She only remembered saying he was from California. She denied saying he was half-black and half-white. But when defense counsel charged her with having told the 911 officer that she did not know anything about Appellant, yet telling the officer a great deal about him, she responded, "I would not call saying he's from San Diego knowing a lot about him."

Complainant testified that she did not remember how she arrived at the police department to be interviewed but that her friend Ryan Bradshaw might have taken her. She later admitted that she had called Ryan to ask for a ride to the police department. She also admitted that Ryan might have been in her apartment at some point during the day, after having previously denied it:

Q. Is it possible that Ryan was at your apartment and the two of you were arguing before these four guys got involved?

A. I guess it could be possible.

Appellant was not allowed to ask her about her relationship with Ryan and what might have happened between them earlier in the day.

Complainant remembered that Ryan came into the interview room. The trial court would not allow defense counsel to discuss anything that occurred between Complainant and Ryan while the detective was out of the interview room.

Outside the presence of the jury, Appellant elicited evidence of Complainant's statements while at Millwood, a hospital for treatment of addiction and mental health problems to which she had been admitted multiple times, as well as other relevant testimony:

• While she did not remember telling Millwood staff, "I'm a love addict and it sucks?", Complainant admitted that it was possible that she had said that;

• Her Millwood records indicated that she had said that she had not accepted the fact that she had been raped;

• [Defense Counsel]: Judge, the line here says, "Therapist stated that it sounded like patient learned to manipulate men, and patient held back tears as she said she did not want to be that type of person." And my question to her is: "Does she recall something like that happening, and is it possible that that's what they wrote?"

Complainant denied that this statement from her Millwood medical records was an accurate assessment;

• Complainant believed that she was "a giant problem" to everyone;

• Complainant had been assaulted by her roommate's husband, but the charges were dropped;

• Someone in the John Peter Smith emergency room had given Complainant Xanax for a panic attack;

***9** • Complainant was on anti-anxiety medication before and at the time of the alleged rape. She took Zoloft for anxiety and took it with alcohol. She stated outside the jury's hearing, "I'm a recovering alcoholic. I drink alcohol with everything"; and

• Complainant had herpes during her Millwood stay and at trial.

The prosecutor objected to the admission of all this evidence as hearsay, not relevant, and not admissible under Rule 404 of the rules of evidence.[18] The trial court sustained the objection and noted Appellant's exception to the ruling (although exception is no longer required to preserve the complaint).[19]

Complainant could remember some of the events of the evening but not all, she had a history of erratic behavior, and she admitted that she had ingested Zoloft and alcohol on the night in question, and perhaps Xanax. She also had a history of in-patient treatment for addiction and mental health issues. All this evidence was provided to the SANE as part of Complainant's medical diagnosis and treatment and was admissible under Rule 803(4) of the rules of evidence.[20] The SANE testified after Complainant. Although the State questioned the SANE before the jury about those portions of Complainant's medical history that supported the prosecution's case, the trial court prevented Appellant from cross-examining her fully. The trial court blocked him from presenting evidence before the jury that supported the theory of the defense. That is, the trial court allowed the State to present to the jury a portion of the medical history, but Appellant was not allowed to offer "the rest of the story" as the rule of optional completeness contemplates.[21] Appellant's bill preserving error covers more than fifteen pages and includes multiple explanations of grounds for admissibility of the evidence. Any trial judge would have understood that Appellant was requesting full cross-examination in order to present his defense to the jury, as well as the reasons the excluded evidence was relevant and admissible.

Generally, Complainant's testimony was contradictory and difficult to follow. But Appellant was not allowed to offer his reasons for the contradictions or his reasons that her testimony was unreliable. That is, he was not allowed to present his defense or to fully impeach Complainant. We therefore hold that the trial court erred by excluding the proffered evidence, thereby violating Appellant's constitutional right to present a defense.[22]

Harm

[9]Under Texas Rule of Appellate Procedure 44.2(a), if the appellate record reveals a constitutional error, we must reverse a judgment of conviction unless we determine beyond a reasonable doubt that the error did not

contribute to the conviction or punishment.[23] When the trial court sustained the prosecution's objections to

> • Appellant's attempts to offer evidence to challenge Complainant's ability to remember the events of the evening and her ability to accurately perceive the events, and to highlight her erratic behavior that might have affected his perception of consent or lack of consent;
>
> ***10** • his attempts to offer medical reasons to explain Complainant's physical and emotional condition that evening; and
>
> • indeed, his attempts to offer his entire defense;

the trial court effectively deprived Appellant of his constitutional rights to due process, to confront his accusers, and to offer a defense.

Appellant told the jury he wanted to give them "the rest of the story." He said, "[T]here are gaps in this case, and we're going to try to plug those gaps for you and let you see what really happened on that day." He made clear to the trial court that he wanted to present his defense and the trial court said no. He argued on appeal that "the trial court's rulings did not allow jurors to fairly and fully evaluate the complainant's credibility and fully present a vital defensive theory," citing *Davis*[24] and *Hammer*.[25] Appellant wanted the jury to hear the rest of the medical evidence, evidence of Complainant's mental status, of her existing pattern of substance abuse and its effects, and of her relationship with the man Appellant contends was her boyfriend in the hours before she invited Appellant into her apartment and after her outcry to police. To put it simply, Appellant wanted the jury to hear evidence that would allow them to judge Complainant's credibility and her ability accurately to report events as well as her motives and biases that would affect her testimony. The jury did not hear that evidence and therefore did not have the whole picture when determining Appellant's guilt and punishment. We therefore cannot conclude that the trial court's error had no effect on the jury verdict and sentence and must hold that it was harmful.

Neither the trial court nor the parties had the benefit of the reasoning and holding of the Texas Court of Criminal Appeals in *Johnson v. State*.[26] The *Johnson* court explained,

> In a case such as this, where the believability of the complainant forms the foundation of the State's case, Texas law favors the admissibility of evidence that is relevant to the complainant's bias, motive, or interest to testify in a particular fashion. "[G]enerally speaking, the Texas Rules of Evidence permit [a] defendant to cross-examine a witness for his purported bias, interest, and motive without undue limitation or arbitrary prohibition."
>
> ....
> The Texas Rules of Evidence permit the defendant to cross-examine a witness for his purported bias, interest, and motive without undue limitation or arbitrary prohibition. Rule 404(b) permits the defense, as well as the prosecution, to offer evidence of other acts of misconduct to establish a person's motive for performing some act—such as making a false allegation against the defendant. Rule 613(b) permits a witness to be cross-examined on specific instances of conduct when they may establish his specific bias, self-interest, or motive for testifying. Rule 412 specifically addresses the admissibility of evidence of a victim's past sexual behavior. Such evidence is admissible if it "relates to the motive or bias of the alleged victim" or "is constitutionally required to be admitted," and if "the probative value of the evidence outweighs the danger of unfair prejudice."[27]

***11** Following *Johnson*, we hold that the evidence Appellant wanted the jury to hear was "constitutionally required to be admitted," and the trial court therefore reversibly erred by excluding it and thereby preventing Appellant from presenting his defense to the jury. We sustain Appellant's first two points, which are dispositive. We do not reach his remaining points.[28]

Conclusion

Having sustained Appellant's first two points, which are dispositive, we reverse the trial court's judgment and remand this case to the trial court for retrial with the benefit of guidance from the *Johnson* court.

LIVINGSTON, C.J., filed a dissenting opinion in which WALKER, GABRIEL, and KERR, JJ., join.

TERRIE LIVINGSTON, CHIEF JUSTICE, dissenting.

The requirements of preserving a complaint for our review are settled and uncomplicated: a party must make a timely request, objection, or motion in the trial court

that states the grounds for the desired ruling with sufficient specificity to make the trial court aware of the complaint, and the trial court must rule on that request, objection, or motion (or the complaining party must object to a refusal to rule). Tex. R. App. P. 33.1(a). This preservation rule generally applies to constitutional arguments, and it particularly applies to a defendant's complaint that a trial court denied the defendant an opportunity to present a defense. *See Garza v. State*, 435 S.W.3d 258, 260–61 (Tex. Crim. App. 2014); *Schumm v. State*, 481 S.W.3d 398, 399 (Tex. App.—Fort Worth 2015, no pet.) ("Although Appellant ... [argues] that a defendant is entitled to testify and to present a defense, he directs us to no place in the record where he raised a constitutional basis for admitting the excluded evidence. He has therefore not preserved his due process claim or any other constitutional claim."). The preservation rule serves two purposes: "(1) it informs the judge of the basis of the objection and affords him an opportunity to rule on it, and (2) it affords opposing counsel an opportunity to respond to the complaint." *Douds v. State*, 472 S.W.3d 670, 674 (Tex. Crim. App. 2015), *cert. denied*, —— U.S. ——, 136 S.Ct. 1461, 194 L.Ed.2d 552 (2016). Serving the first purpose, the rule requires a party to inform the trial court "what he wants *and why he feels himself entitled to it* clearly enough for the judge to understand him." *Vasquez v. State*, 483 S.W.3d 550, 554 (Tex. Crim. App. 2016) (emphasis added).

In this appeal, appellant Joshua Golliday contends that the trial court violated his constitutional rights of confrontation, due process, and the ability to present a defense by restricting his cross-examination of two witnesses. He did not raise those complaints at any point in the trial court. Thus, the principles of preservation require us to conclude that he forfeited the complaints. Indeed, our own cases compel this result. Because the majority instead sustains appellant's first two points and reverses his sexual assault conviction on arguments that he presents for the first time in this court, I must dissent.

In appellant's first point, he argues that the trial court violated his constitutional rights of confrontation and due process by restricting his cross-examination of the complainant concerning her outpatient and inpatient treatment at "Millwood," along with other matters. At the end of appellant's questioning of the complainant outside of the jury's presence, the following exchange occurred:

> ***12** [DEFENSE COUNSEL]: Judge, we would submit that all of this testimony is relevant and should come before the jury so the jury can get the whole picture of the situation. So ... we'd like to ask these questions in front of the jury.
>
> [THE STATE]: Your Honor, we'd object as hearsay. Also, it is not relevant to anything related to the elements in this case. Also, it should not be admissible under 404. Argue none of it should be admissible.
>
> THE COURT: Sorry. I didn't hear that last part.
>
> [THE STATE]: Under 404, it should not be admissible. And also, additionally, I stated—I believe it's hearsay and not relevant.
>
> THE COURT: I sustain the objection.

In his second point, appellant contends that the trial court violated his constitutional rights of confrontation and due process by limiting his cross-examination of Jill Zuteck, the complainant's sexual assault nurse examiner. During appellant's cross-examination of Zuteck, the following exchange occurred:

> [DEFENSE COUNSEL]: The State has asked this witness about her report as to the past medical history given to her by the victim, and she repeated several things about the patient's history that was given to her by [the complainant]. Included in that report and part of the past medical history is that she was taking Xanax and Zoloft and that she had been suffering from anxiety as a current condition and also that she had a chronic problem with herpes. That is all in the medical report.
>
> ... So I think the State has opened the door to discussing the rest of the medical history.
>
> THE COURT: And specifically what are you trying to get into?
>
> [DEFENSE COUNSEL]: The fact that she—all of it, Your Honor. It's on the—
>
> THE COURT: Let me hear it for the record. What is it you're trying to get into?
>
> [DEFENSE COUNSEL]: That [the complainant] was taking Xanax and Zoloft, that she had current problems with anxiety, and that she had a chronic problem of herpes.
>
> THE COURT: Response?
>
> [THE STATE]: Yes, Your Honor.
>
> ....
>
> I think they're trying to elaborate on something that wasn't asked of this witness. And besides that, they're still trying to get into 404 information, relevance of this

> information, other than to basically smear this victim's character, which isn't acceptable at this time. That violates 404. So we continue our objections. We do not believe the door has been opened.

After this exchange, the trial court heard brief testimony from Zuteck outside of the jury's presence concerning the medications the complainant had taken, the complainant's problems with anxiety, and the complainant's herpes condition. At the end of the testimony, appellant urged the trial court to allow Zuteck to testify concerning the same facts to the jury, contending that the testimony was "relevant to explaining some of [the complainant's] behavior that evening." The State contended that the testimony was "not relevant and still goes to 404." The trial court sustained the State's objection to the testimony.

On appeal, appellant contends that the trial court's decisions to sustain the State's objections to the complainant's and to Zuteck's testimony were erroneous because the decisions did not allow the jury to fairly and fully evaluate the complainant's credibility or allow him to present his defensive theory. Citing *Hammer v. State*, he emphasizes that the constitution is "offended if the state evidentiary rule would prohibit him from cross-examining a witness ... to such an extent that he could not present a vital defensive theory." 296 S.W.3d 555, 562–63 (Tex. Crim. App. 2009).

***13** The constitutional right to a meaningful opportunity to present a defense is subject to forfeiture if not raised in the trial court. *Anderson v. State*, 301 S.W.3d 276, 280 (Tex. Crim. App. 2009). Thus, to preserve an argument that the exclusion of defensive evidence violates constitutional principles, a defendant must present that contention in response to the State's objection to the evidence in the trial court. *Reyna v. State*, 168 S.W.3d 173, 174 (Tex. Crim. App. 2005) ("[Reyna] attempted to introduce evidence which the trial judge excluded. He did not argue that the Confrontation Clause demanded admission of the evidence, but the Court of Appeals reversed the conviction on these grounds. We conclude that the appellate court erred because Reyna, as the proponent of the evidence, was required to offer the evidence for its admissible purpose, and he did not do so."). Appellant did not present constitutional arguments in response to the State's objections, so he forfeited those arguments. *See id.*

The majority appears to rely on two theories to hold that appellant preserved his constitutional complaints. First, relying on rule of evidence 103,[2] the majority appears to conclude that because appellant was the proponent of the excluded evidence, he needed only make an offer of proof, which served the purpose of informing the trial court *what* he wanted to introduce,[3] and needed not provide constitutional grounds for the admission of the evidence, which would have informed the trial court *why* he wanted to introduce it. *See* Majority Op. at ——.

The court of criminal appeals rejected this exact argument in *Reyna*, 168 S.W.3d at 176–80. There, the State charged Reyna with indecency with a child, and at trial, after the State questioned the complainant, Reyna sought to introduce evidence of the complainant's prior false allegation of sexual assault. *Id.* at 174. Reyna made an offer of proof, informing the trial court what the complainant and other witnesses would likely testify to concerning that prior allegation. *Id.* at 174–75. The State objected to the admission of the evidence, and Reyna did not offer a constitutional basis for its admission. *Id.* at 175. On appeal from his conviction, Reyna argued that he had been denied the constitutional right of cross-examination. *Id.* The State argued that Reyna had not preserved that complaint. *Id.* at 176. The court of criminal appeals held that the complaint was not preserved and reasoned,

> At first blush, the State's argument appears to lack merit. We have held, and [rule of evidence 103] make[s] clear, that to preserve error in the exclusion of evidence, the proponent is required to make an offer of proof and obtain a ruling. Since *Reyna* did both these things, he seems to have preserved error.
>
> But a less common notion of error preservation comes into play in this case, although certainly not a novel one. Professors Goode, Wellborn and Sharlot refer to it as "party responsibility." They explain it this way:
>
> > To the question, which party has the responsibility regarding any particular matter, it is infallibly accurate to answer with another question: which party is complaining now on appeal? This is because in a real sense both parties are always responsible for the application of any evidence rule to any evidence. Whichever party complains on appeal about the trial judge's action must, at the earliest opportunity, have done everything necessary to bring to the judge's attention the evidence rule in question and its precise and proper application to the evidence in question.

***14** The basis for party responsibility is, among other things, Appellate Rule 33.1.... *[I]t is not enough to tell the judge that evidence is admissible. The proponent, if he is the losing party on appeal, must have told the judge why the evidence was admissible.*

....

> *Although this case involves a proffer of evidence rather than an objection, the same rationale applies.* Reyna did not argue that the Confrontation Clause demanded admission of the evidence. Reyna's arguments for admitting the evidence could refer to either the Rules of Evidence or the Confrontation Clause. His arguments about hearsay did not put the trial judge on notice that he was making a Confrontation Clause argument.... The Court of Appeals erred in reversing Reyna's conviction on a ground that he did not present to the trial judge.

Id. at 176–80 (emphasis added) (footnotes and citations omitted).

Following *Reyna*'s lead, this court—including in opinions written by the honorable author of the majority opinion in this appeal—has correctly held on many occasions that when a defendant offers evidence and the State objects, the defendant must then propose constitutional grounds for admission to preserve constitutional complaints for appeal. *See, e.g.*, *Schumm*, 481 S.W.3d at 399 (Dauphinot, J.); *Smallwood v. State*, 471 S.W.3d 601, 614 (Tex. App.—Fort Worth 2015, pet. ref'd) (op. on reh'g) (Dauphinot, J.) ("[Appellant] did not sustain his burden of explaining to the trial court ... why ... testimony was admissible ... under a constitutional provision. We therefore overrule Appellant's fourth and fifth issues."); *Taylor v. State*, No. 02-11-00037-CR, 2012 WL 662373, at *3 (Tex. App.—Fort Worth Mar. 1, 2012, pet. ref'd) (mem. op., not designated for publication) (Dauphinot, J.) (citing *Reyna* to hold that constitutional complaints were not preserved and stating that "the party must, in addition to showing the trial court *what* the actual testimony would be, explain *why* the ruling is erroneous" (emphasis added)). Honorable justices joining the majority opinion in this appeal have joined (and in some cases authored) similar opinions to the three cited above. *See, e.g.*, *Harper v. State*, No. 02-15-00374-CR, 2016 WL 4045203, at *5 (Tex. App.—Fort Worth July 28, 2016, no pet.) (mem. op., not designated for publication); *Gonzalez v. State*, No. 02-14-00229-CR, 2015 WL 9244986, at *12 (Tex. App.—Fort Worth Dec. 17, 2015, pet. ref'd) (mem. op., not designated for publication), *cert. denied*, —— U.S. ——, 137 S.Ct. 169, 196 L.Ed.2d 123 (2016); *Chavezcasarrubias v. State*, No. 02-14-00418-CR, 2015 WL 6081502, at *3 (Tex. App.—Fort Worth Oct. 15, 2015, no pet.) (mem. op., not designated for publication). The majority opinion does not offer an adequate basis for overruling these precedential decisions or for disregarding the binding holding in *Reyna*.

Second, the majority appears to hold that if appellant was required to raise constitutional complaints in the trial court to preserve them for appeal, he did so by merely stating that he offered the evidence to present "the rest of the story"[4] and to allow the jury to "get the whole picture." Majority Op. at ——. These comments, however, were insufficient to make the trial court and the State aware that appellant was raising constitutional complaints, as rule 33.1(a)(1)(A) requires. *See* Tex. R. App. P. 33.1(a)(1)(A).

***15** In *Reyna*, the court held that when a trial court excludes a defendant's offered evidence and the defendant's rationale for admitting the evidence is unclear, the defendant must "suffer on appeal the consequences of his insufficiently specific offer." 168 S.W.3d at 179. The court further explained that when a defendant's proposal for admission "encompasses complaints under both the Texas Rules of Evidence and [constitutional provisions], the objection is not sufficiently specific to preserve error." *Id.*

Generally, for a non-explicit complaint to serve the two purposes of preservation explained above—allowing the trial court to rule on the complaint and allowing the State to respond to it—there must be "statements or actions on the record that clearly indicate what the judge and opposing counsel understood the argument to be." *Clark v. State*, 365 S.W.3d 333, 339 (Tex. Crim. App. 2012). An appellant may not "bootstrap" a constitutional complaint from an "innocuous trial objection." *Id.*

After the complainant testified outside of the jury's presence about her stay at Millwood, the State objected on grounds of hearsay and relevancy. Appellant responded to those objections by arguing that the testimony was relevant: "Judge, we would submit that all of this testimony is relevant and should come before the jury so the jury can get the whole picture of the situation." Concerning the admission of Zuteck's testimony, appellant argued that the State had opened the door to the complainant's medical history and that Zuteck's testimony was relevant. Nothing in the record indicates that anyone in the courtroom understood appellant to be raising constitutional complaints.

Nor has appellant ever argued that the "get the whole picture" or "rest of the story" comments raised constitutional complaints. In his original brief, he did not address preservation with regard to his first two points. He did not file a reply brief to respond to the preservation arguments that the State made within its brief. In his response to the State's motion for rehearing, he argued that his offer of proof—which showed *what* evidence he wanted to admit but not any constitutional reasons he wanted to admit it—was sufficient to preserve error. He asserted,

> Everyone in the courtroom at the time the trial court heard the proffered testimony outside of the jury knew exactly *what evidence was being offered* by Appellant, and *why the prosecutor was objecting*.... The trial court was on clear notice what the proffered testimony was, as well as why the State objected. Error was preserved. [Emphasis added.]

At trial, appellant did not comply with the fundamental, explicit, systemic requirement to state "the grounds for the ruling that [he] sought from the trial court with sufficient specificity to make the trial court aware of the complaint." Tex. R. App. P. 33.1(a)(1)(A); *Snodgrass v. State*, 490 S.W.3d 261, 268 (Tex. App.—Fort Worth 2016, no pet.) (stating that preservation of error "is a systemic requirement"). As the losing party at trial, he cannot benefit from his "insufficiently specific offer." *Reyna*, 168 S.W.3d at 179.

For all these reasons, this court should conclude that appellant did not preserve his constitutional complaints for our review, and we should not reach the merits of the complaints. *See* Tex. R. App. P. 33.1(a)(1)(A); *Snodgrass*, 490 S.W.3d at 268 ("A reviewing court should not address the merits of an issue that has not been preserved for appeal."). We should not reverse appellant's conviction on an argument that the trial court never considered. We also should not depart from the precedent of the court of criminal appeals and from this court. Because the majority's opinion does so, I respectfully dissent.

WALKER, GABRIEL, and KERR, JJ., join.

All Citations

--- S.W.3d ----, 2017 WL 3196479

Footnotes

1 The en banc court for this appeal consists of all members of the court and Senior Justices Lee Ann Dauphinot and Anne Gardner. *See* Tex. R. App. P. 41.2(a).

2 483 S.W.3d 550 (Tex. Crim. App. 2016).

3 Tex. R. Evid. 103 (emphasis added).

4 *Id.*

5 *Id.*; *see, e.g.*, *Holmes v. State*, 323 S.W.3d 163, 168 (Tex. Crim. App. 2009).

6 *Holmes*, 323 S.W.3d at 168 (internal quotation marks and footnotes omitted).

7 *Hallco Tex., Inc. v. McMullen Cty.*, 221 S.W.3d 50, 63 (Tex. 2007).

8 *Bryant v. State*, 391 S.W.3d 86, 92 (Tex. Crim. App. 2012) (internal quotation marks and citation omitted).

9 *Pena v. State*, 353 S.W.3d 797, 807 n.8 (Tex. Crim. App. 2011) (internal quotation marks and citation omitted).

10 Appellant's Brief at 6.

11 490 S.W.3d 895 (Tex. Crim. App. 2016).

12 541 U.S. 36, 57, 124 S.Ct. 1354, 1367–68, 158 L.Ed.2d 177 (2004).

13 296 S.W.3d at 561–63 (footnotes and citations omitted) (quoting *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974)).

14 916 S.W.2d 494, 497–98 (Tex. Crim. App. 1996) (citations omitted).

15 739 S.W.2d 25 (Tex. Crim. App. 1987).

16 *Id.* at 29.

17 490 S.W.3d at 914–15.

18 *See* Tex. R. Evid. 404.

19 *See* Tex. R. App. P. 33.1(c).

20 *See* Tex. R. Evid. 803(4); *Reed v. State*, 497 S.W.3d 633, 638 (Tex. App.—Fort Worth 2016, no pet.).

21 *See* Tex. R. Evid. 107.

22 *See Holmes*, 323 S.W.3d at 173.

23 *Id.* at 173–74.

24 415 U.S. at 316, 94 S.Ct. at 1110.

25 296 S.W.3d at 561–63.

26 490 S.W.3d 895 (Tex. Crim. App. 2016).

27 *Id.* at 910 (citations omitted).

28 *See* Tex. R. App. P. 47.1.

2 *See* Tex. R. Evid. 103.

3 The majority writes,

> Appellant did exactly what he was supposed to do. He told the trial court clearly *what* evidence he wanted the jury to hear, the prosecution objected, and the trial court sustained the objections, thereby holding that Appellant could not present his impeachment evidence before the jury. He therefore preserved his complaints about the exclusion of evidence.

Majority Op. at ——(emphasis added).

4 Appellant's "rest of the story" comment was not made during his attempt to introduce the excluded evidence. Rather, the comment was made during appellant's opening statement to the jury, which occurred after the challenged rulings and after the State rested.

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APPENDIX B
THE WITHDRAWN PANEL OPINION

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-15-00416-CR

JOSHUA GOLLIDAY — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM THE 371ST DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 1379815D

MEMORANDUM OPINION[1]

A jury convicted Appellant Joshua Golliday of sexual assault and assessed his punishment at two years' confinement, recommending that the imposition of the sentence be suspended and that Appellant be placed on community supervision. The trial court sentenced Appellant to two years' confinement,

[1]*See* Tex. R. App. P. 47.4.

suspended imposition of his sentence, and placed him on community supervision for seven years.

Appellant brings five points on appeal, complaining of limitations on his right of cross-examination, limitations on his right to offer character evidence, prosecuting counsel's improper comment on his decision not to testify, and the cumulative effect of the errors. Because the trial court reversibly erred in preventing Appellant from presenting his defense by improperly limiting his right to cross-examine witnesses concerning the complainant's ability accurately to understand and to recall the events of the evening, we reverse the trial court's judgment and remand this cause to the trial court.

Brief Facts

Appellant's brother and the complainant were both tenants in the Depot Apartments. In the late evening of January 4, 2013, Appellant, his brother, two of their male friends, and the complainant were just outside or in the complainant's apartment. The men and the complainant had just met. Appellant's brother went home first, and then another friend also left. Eventually, the remaining friend left, and Appellant drove the complainant to get some cigarettes. She also decided to pick up a movie from Red Box. When the complainant and Appellant returned to her apartment, she invited him in to watch the movie. They began to make out, and here the stories diverge.

The complainant said that Appellant had sexual intercourse with her without her consent. She called 911 and told the 911 operator that Appellant ran

as soon as she called the police. She followed him out of the apartment and chased him while speaking on her phone to the 911 operator. The police responded to the call, and the complainant went to the hospital, where she met with a sexual assault nurse examiner (SANE). A detective interviewed Appellant's brother, and Appellant was eventually arrested and charged with sexually assaulting the complainant.

Limitation of Cross-Examination of the Complainant and the SANE

In his first two points, Appellant argues that the trial court's denial of his right to cross-examine the complainant and the SANE was a violation of his rights under the Confrontation and Due Process clauses of the state and federal constitutions. The complainant testified before the jury that she had been drinking that night. Appellant attempted to offer evidence that shortly after the date of the alleged assault, she was treated at Millwood. Outside the presence of the jury, the complainant testified that she knew that both the State and Appellant's counsel had her lengthy records from Millwood. She said that it was possible that she had admitted to the staff at Millwood that she had not accepted that she had been raped. The complainant told Millwood staff that she was "a giant problem to everyone" and that she had had a panic attack and had taken Xanax to cope. She told the SANE that she had herpes and suffered from anxiety. The complainant also told the SANE that she was on medication at the time of the alleged assault. The complainant testified in the voir dire hearing that

she is a recovering alcoholic and that she "drink[s] alcohol with everything," including Zoloft.

Appellant's counsel stated,

> Judge, we would submit that all of this testimony is relevant and should come before the jury so the jury can get the whole picture of the situation. So we're offering—we'd like to ask these questions in front of the jury.

The prosecutor's objections to hearsay and relevancy and under rule 404 were sustained, and the jury was not allowed to hear any of this evidence. Appellant clarified the trial court's ruling, asking if the trial court was prohibiting the defense from going into any of the matters raised in the offer of proof. The trial court responded, "Correct," and Appellant excepted to the trial court's ruling.

When the SANE testified, Appellant made another offer of proof outside the presence of the jury. The SANE testified in that proffer that the complainant had told her that she took Xanax and Zoloft. The SANE also testified that mixing Xanax with alcohol can cause certain effects, including memory distortion and blackouts, as well as dramatic mood changes. The SANE additionally testified in the proffer that the complainant had told her that she has problems with anxiety and chronic problems with herpes.

Appellant argued that this information is relevant to explaining some of the complainant's behavior at the time of the incident tied directly to her ability to remember parts of the evening specifically but inability to remember other parts. The prosecutor objected that this proffered testimony was irrelevant and a

violation of rule 404. The trial court sustained the objection and excluded the proffered testimony.

Rule 103 of the rules of evidence establishes the mode of preserving error in the exclusion of evidence:

> (a) Preserving a Claim of Error. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:
>
> (1) if the ruling *admits evidence*, a party, on the record:
>
> (A) timely objects or moves to strike; and
>
> (B) states the specific ground, unless it was apparent from the context; or
>
> (2) if the ruling *excludes evidence*, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.[2]

When evidence is improperly admitted, objection is required to preserve the complaint.[3] When evidence is improperly excluded, no objection is required, but a proper offer of proof is required.[4] As the *Holmes* court has explained,

> This court has recognized a distinction between the general rule in Rule 103(a)(2) and the case in which the defendant is not permitted to question a State's witness about matters that might affect the witness's credibility.
>
> In the latter case, "the defendant need not show what his cross-examination of the witness would have affirmatively

---

[2]Tex. R. Evid. 103 (emphasis added).

[3]*Id.*

[4]*Id.*; *see, e.g.*, *Holmes v. State*, 323 S.W.3d 163, 168 (Tex. Crim. App. 2009).

> established; he must merely establish what general subject matter he desired to examine the witness about during his cross-examination and, if challenged, show on the record why such should be admitted into evidence." In such a case the trial court's ruling has prevented a defendant from questioning a State's witness about subject matters which affect the witness's credibility, that is, matters which might show malice, ill feeling, ill will, bias, prejudice, or animus.[5]

We therefore hold that Appellant's complaints were preserved.[6]

Appellant's defense was that the sexual activity was consensual. The excluded testimony was offered to show the complainant's ability to recall the events and to explain her conduct on the night of the alleged assault.

Appellant argues that the trial court's exclusion of the evidence improperly limited cross-examination that would reveal motive or bias of a witness and that it therefore violated his Sixth Amendment protections, quoting *Hammer v. State*:

> Trials involving sexual assault may raise particular evidentiary and constitutional concerns because the credibility of both the complainant and defendant is a central, often dispositive, issue. Sexual assault cases are frequently "he said, she said" trials in which the jury must reach a unanimous verdict based solely upon two diametrically different versions of an event, unaided by any physical, scientific, or other corroborative evidence. Thus, the Texas Rules of Evidence, especially Rule 403, should be used sparingly to exclude relevant, otherwise admissible evidence that might bear upon the credibility of either the defendant or complainant in such "he said, she said" cases. And Texas law, as well as the federal constitution, requires great latitude when the evidence deals with a witness's specific bias, motive, or interest to testify in a particular fashion.

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[5] *Holmes*, 323 S.W.3d at 168 (footnotes omitted).

[6] *See id.*

> But, as the Supreme Court noted in *Davis v. Alaska*, there is an important distinction between an attack on the general credibility of a witness and a more particular attack on credibility that reveals "possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand." Thus, under *Davis*, "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." However, as Justice Stewart noted in concurrence, the Court neither held nor suggested that the Constitution confers a right to impeach the general credibility of a witness through otherwise prohibited modes of cross-examination. Thus, the *Davis* Court did not hold that a defendant has an absolute constitutional right to impeach the general credibility of a witness in any fashion that he chooses. But the constitution is offended if the state evidentiary rule would prohibit him from cross-examining a witness concerning possible motives, bias, and prejudice to such an extent that he could not present a vital defensive theory.[7]

And in *Carroll v. State*, the Texas Court of Criminal Appeals stated:

> The Constitutional right of confrontation is violated when appropriate cross-examination is limited. The scope of appropriate cross-examination is necessarily broad. A defendant is entitled to pursue all avenues of cross-examination reasonably calculated to expose a motive, bias or interest for the witness to testify. When discussing the breadth of that scope we have held,
>
> > . . . [.] Evidence to show bias or interest of a witness in a cause covers *a wide range and the field of external circumstances from which probable bias or interest may be inferred is infinite. The rule encompasses all facts and circumstances, which when tested by human experience, tend to show that a witness may shade his testimony* for the purpose of helping to establish one side of the cause only.[8]

[7]296 S.W.3d 555, 561–63 (Tex. Crim. App. 2009) (footnotes and citations omitted) (quoting *Davis v. Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, 1110 (1974)).

[8]916 S.W.2d 494, 497–98 (Tex. Crim. App. 1996) (citations omitted).

As Appellant points out, these words of the Texas Court of Criminal Appeals are applicable in this situation, where the trial court sustained the prosecutor's objections and limited Appellant's right to cross-examination.

Appellant, citing the discussion of the issue in *Virts v. State*,[9] argues that this rule also applies to the ability to cross-examine a witness regarding a mental state that might affect the witness's ability accurately to perceive, to recall, and to recount the events to which the witness is called to testify:

> [T]his Court has often stated and discussed the fact that one of the greatest constitutional rights that an accused person might have is the right to confront and cross-examine the State's witnesses . . . .
>
> . . . [W]e believe that it is still necessary to point out, for emphasis purposes, that the right of cross-examination by the accused of a testifying State's witness includes the right to impeach the witness with relevant evidence that might reflect bias, interest, prejudice, inconsistent statements, traits of character affecting credibility, or evidence that might go to any impairment or disability affecting the witness's credibility.[10]

More recently, the Texas Court of Criminal Appeals has addressed the right of a person charged with a criminal offense to cross-examine his accuser on issues that would aid the jury in assessing the accuser's credibility. In *Johnson v. State*, the Court reminded us that a defendant has a constitutional

[9]739 S.W.2d 25 (Tex. Crim. App. 1987).

[10]*Id.* at 29.

right to present his defense to the jury so that the jury may weigh his evidence along with the rest of the evidence presented.[11]

In the case now before this court, the issue of sexual intercourse was uncontested. The only contested issue was consent. This case was a swearing match between Appellant and the complainant, a traditional "he said, she said" case. The complainant could remember some of the events of the evening but not all, she had a history of erratic behavior, and she admitted that she had ingested Xanax, Zoloft, and alcohol on the night in question. She also had a history of inpatient treatment at Millwood, a hospital for treatment of addiction and mental health problems. All of this evidence was provided to the SANE as part of the complainant's medical diagnosis and treatment, but Appellant was not allowed to go into these issues before the jury. He was not allowed to present his defense. We therefore hold that the trial court erred by excluding the proffered evidence and thereby violating Appellant's constitutional right to present a defense.[12]

Under Texas Rule of Appellate Procedure 44.2(a), if the appellate record reveals a constitutional error, we must reverse a judgment of conviction unless

[11]490 S.W.3d 895, 910, 914–15 (Tex. Crim. App. 2016).

[12]*See Holmes*, 323 S.W.3d at 173.

we determine beyond a reasonable doubt that the error did not contribute to the conviction or punishment.[13]

When the trial court sustained the prosecution's objections to Appellant's attempts to offer evidence to challenge the complainant's ability to remember the events of the evening, her ability to accurately perceive the events, and her erratic behavior that might have affected his perception of consent or lack of consent; his attempts to offer medical reasons to explain the complainant's physical and emotional condition that evening; and, indeed, his attempts to offer his entire defense, the trial court effectively deprived Appellant of his constitutional rights to due process, to confront his accusers, and to offer a defense. We hold that the trial court reversibly erred by preventing Appellant from presenting this evidence to the jury. We sustain Appellant's first two points. Because our resolution of these two points is dispositive, we do not reach Appellant's remaining three points.[14]

Having sustained Appellant's first two points, which are dispositive, we reverse the judgment of the trial court and remand this case to the trial court for proceedings consistent with this opinion.

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[13]*Id.* at 173–74.

[14]*See* Tex. R. App. P. 47.1.

/s/ Lee Ann Dauphinot
LEE ANN DAUPHINOT
JUSTICE

PANEL: LIVINGSTON, C.J.; DAUPHINOT and GARDNER, JJ.

LIVINGSTON, C.J., dissents without opinion.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: October 13, 2016

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-15-00416-CR

Joshua Golliday	§	From the 371st District Court
	§	of Tarrant County (1379815D)
v.	§	October 13, 2016
	§	Opinion by Justice Dauphinot
The State of Texas	§	(nfp)

JUDGMENT

This court has considered the record on appeal in this case and holds that there was error in the trial court's judgment. It is ordered that the judgment of the trial court is reversed and this case is remanded to the trial court for proceedings consistent with this opinion.

SECOND DISTRICT COURT OF APPEALS

By _/s/ Lee Ann Dauphinot_____
Justice Lee Ann Dauphinot